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No. 84-1316

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

TEXACO INC.,
Petitioner,
v.
DEPARTMENT OF ENERGY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

# REPLY OF TEXACO INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## REPLY OF TEXACO INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI[1]

The history of this case is marked by the Department of Energy's (DOE's) changes of position, which began, of course, when it disavowed the authorized interpretation given to Texaco in the form of a letter from the agency's Regional Director. DOE's Brief in Opposition (Br. Opp.) continues the tradition. Texaco has maintained from the outset that the shrinkage rule recognized as a cost the price that a processor would have received for natural gas liquid products sold as natural gas. R. 716. DOE has castigated this interpretation, insisting that the rule permitted use only of average residue prices, even if the shrinkage volumes would demonstrably have been sold at higher prices. *See* R. 4362-63; R. 4801-03, 4804-05; R. 5277. Now, attempting to defend the rationality of its position, DOE recharacterizes its interpretation as recognizing the price "the gas processor would have received for the NGLs." Br. Opp. 3. That assertion is wrong. Because DOE's interpretation fails to take into account fixed-quantity intrastate gas sales contracts, it would deny gas processors operating in the intrastate market recovery of the price they "would have received." It is precisely for that reason that Texaco has prosecuted this lawsuit, contending the rule as so interpreted is unreasonable.

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[1] Texaco's petition was timely filed pursuant to an extension of time granted by the Chief Justice on behalf of the Court. Jurisdiction is based on section 211(g) of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. § 1904 note (1976), which authorizes the filing of a

DOE also misstates, again, the underlying issue.[2] Texaco

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petition for writ of certiorari within thirty days after judgment is entered by TECA. The Court is authorized by 28 U.S.C. § 2101(c) (1982) to extend for up to sixty days the time for filing a petition, and there is nothing in ESA § 211(g) or its legislative history to forbid application of the Court's ordinary authority for extensions of time under section 2101(c) to petitions filed under ESA. *See* S. REP. NO. 92-507, 92nd Cong., 1st Sess. 12 (1971); H. R. REP. NO. 92-714, 92nd Cong., 1st Sess. 8 (1971); S. REP. NO. 92-579, 92nd Cong., 1st Sess. 20-21 (1971). In these circumstances, we submit that the Court has not exceeded its authority in granting numerous extensions of time to file petitions under ESA § 211(g).

DOE's suggestion that authority to extend the thirty-day ESA deadline would defeat the purpose of the rule is plainly incorrect. The maximum time for filing a petition (including extensions) has been shortened by sixty days, and the Court, of course, can deny any extension if there is reason for more expeditious treatment of a case (a showing DOE has not even attempted to make here).

[2] DOE is also incorrect in stating that no common issues are raised in this petition and the petition of Exxon Corp. in No. 84-1142. Texaco expressly adopted as its own the issues raised by Exxon, Texaco Pet. i note, and Exxon similarly adopted the issues raised by Texaco to the extent applicable to Exxon, Exxon Pet. i note.

does not, as DOE suggests, seek to base its costs on a "theoretical intrastate gas market price." Br. Opp. 4. TECA correctly recognized that petitioners' "method is based on sales that could have been made under higher-priced surplus contracts in existence," Texaco Pet. App. 14a, but DOE seems to have forgotten the lower court's finding.

DOE's institutional memory regarding certain other relevant facts seems also to be faulty. The record does not, as DOE claims, "reflect . . . that the petitioner was served" with DOE's summary judgment motion. Br. Opp. 5 n.3. Counsel for Texaco filed an affidavit denying service, a fact DOE did not attempt to refute.[3] *See* Texaco Pet. 6. Furthermore, DOE's claim that "the estoppel issue was, in fact, argued as a matter of law" in its summary judgment brief is incorrect. The Court can readily verify that the term "estoppel" nowhere appears in DOE's brief. R. 4295. The issue was never presented to the district court. Nor did the court rule on that issue (or even mention it) in its memorandum opinion, as DOE states. Br. Opp. 6. The district court only addressed the estoppel issue some months later in a supplemental memorandum. Texaco Pet. App. 86a.

a. DOE's response concerning the summary judgment issue proves Texaco's point. DOE argues the merits of Texaco's estoppel claim—that reliance on its informal interpretation was unreasonable and that its interpretation was unauthorized. Br. Opp. 7-8. These are contested issues of material fact that cannot be resolved on a motion for summary judgment, but only after a full hearing of the evidence, which Texaco was denied by the lower courts.[4]

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[3] DOE's citation to the record on this point is to its own certificate of service.

[4] Texaco would have shown, for example, that it would have been futile to seek an interpretation from the Office of General Counsel on

DOE's argument that Texaco's factual claims were "almost certainly futile" has been rejected by this Court. DOE's argument is that, since the regulations (and the letter to Texaco) authorized reliance only on formal interpretations and rulings, Texaco's reliance on the Regional Director's interpretation was unreasonable as a matter of law. But in *Bowles v. Seminole Rock & Sand*, 325 U.S. 410 (1945), this Court disregarded a similar OPA regulation cautioning that reliance was authorized only on official interpretations, *see* 7 Fed. Reg. 971, 975 (1942); 7 Fed. Reg. 8961, 8965 (1942), and accorded deference to a publicly distributed pamphlet, various press releases, and "countless explanations and interpretations given to inquirers." 325 U.S. at 417-18. Furthermore, contrary to DOE's assertion, deposition testimony by two agency officials that the interpretation the Regional Director issued to Texaco *was* authorized was hardly "refuted" by the Assistant General Counsel's affidavit that he had "no recollection" of such authorization. R. 6695.

It is, of course, true that Texaco did not address the estoppel issue in its motion for summary judgment, Br. Opp. 8; it is customary for a motion to address only the issues its proponent seeks to present to the court. Texaco did, however, remind the district court at oral argument, without contradiction by DOE, that the issue was not before the Court. R. 4947. Texaco had earlier stated this position in papers filed with the Court.[5] And although no affidavit was

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such an urgent matter because that Office was taking years to process such requests. Texaco would also have shown that the Regional Director himself urged Texaco to submit a written request directly to him instead of to the General Counsel and represented he, the Regional Director, was authorized to respond for the agency in such matters.

[5] DOE's statement that Texaco did not file its interrogatory answers and objections with the court is false. Br. Opp. 8. The document in question was filed with the court and entered on the docket on November 5, 1981.

filed for the same reason, there was uncontroverted deposition testimony in the record supporting Texaco's positions on reliance and authorization. *See* Texaco Pet. 9-10. Rule 56 does not require that evidence establishing an issue of fact be presented in affidavit form, but specifically refers to "the pleadings, *depositions*, answers to interrogatories, and admissions on file, together with the affidavits, *if any*." FED. R. CIV. P. 56(c) (emphasis added). *See Pace v. Southern Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969); *Hoston v. J.R. Watkins Co.*, 300 F.2d 869, 870 (9th Cir. 1962).

A very recent decision of the Second Circuit has reaffirmed that a government agency may be bound by its informal written assurances. *LeCroy Research Systems Corp. v. Commissioner of Internal Revenue*, 751 F.2d 123, 126-27 (2d Cir. 1984). The court, on abuse of discretion grounds, prohibited the agency from enforcing a regulation contrary to the informal advice it had previously given. It is clear that whatever the theory—"abuse of discretion" or "estoppel"—the Second Circuit, like the Ninth, is unprepared to countenance agency action, like the DOE's in this case, that amounts to saying, "The joke is on you. You shouldn't have trusted us." *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970).

b. Like the court of appeals, DOE has missed the point concerning the weight to be given contemporaneous agency constructions of regulations. TECA accords informal agency constructions no weight simply because they are informal, in clear contravention of this Court's holding in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. at 417-18. The additional authorities DOE cites for its position, Br. Opp. 9, all from TECA, serve only to underscore Texaco's point that the law established by that court of appeals is not in conformity with governing precedent.[6]

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[6] Furthermore, TECA disregarded in this case not only the interpretation issued to Texaco, but two other interpretations as well. R. 4019; R. 3085. One of those interpretations was published and publicly available. R. 3085.

c. DOE defends TECA's relevant factors holding by attempting, without success, to establish that the agency considered intrastate gas sales contracts. Br. Opp. 10. In fact, all DOE shows is that the agency was aware intrastate gas prices exceeded interstate prices. R. 3059. There is no evidence, however, that the agency took into account intrastate marketing practices in general or intrastate contracts in particular.[7]

The point remains that TECA held it could presume a relevant factor was considered by the agency without any evidence in the administrative record. App. 27a-29a. Such a rule uproots the principle, recently reaffirmed by this Court in *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 103 S.Ct. 2856, 2866-67, 77 L.Ed.2d 443, 460-63 (1983), that an agency must examine the relevant data and articulate a satisfactory explanation for its action. Contrary to DOE's assertion, such a rule is of vital continuing importance to administrative law. Unless this Court is inclined to abandon completely the relevant factors test for judging the substantive validity of agency rules, it cannot permit a presumption of consideration on a barren record.

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[7] Indeed, two of the principal authors of the rules in question testified that they were unaware of the types of contracts utilized in the intrastate market. R. 2120-21; R. 2266, 2271, 2273-74.

## CONCLUSION

The petition for a writ of certiorari to the Temporary Emergency Court of Appeals should be granted.

Respectfully submitted,

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April 29, 1985

## CERTIFICATE OF SERVICE

I, Michael J. Henke, attorney of record for petitioner and a member of the Bar of this Court, certify that on the 29th day of April, 1985, the foregoing Reply was served upon each party to the proceeding in according with Rule 28.3 by mailing three copies, first-class, postage prepaid, to each of the following: Solicitor General, Department of Justice, Washington, D.C. 20530; Don W. Crockett, Esq., Office of General Counsel, U.S. Department of Energy, 1000 Independence Ave., S.W., Washington, D.C. 20565; Keith A. Jones, Fulbright & Jaworski, 1150 Connecticut Ave., N.W., Washington, D.C. 20036.

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